STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 19, 2007
v	No. 268805 Wayne Circuit Court
NEIL EDMUND AKANS, Defendant-Appellant.	LC No. 05-009765-01

Before: Bandstra, P.J., and Zahra and Fort Hood, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of three counts of first-degree criminal sexual conduct (CSC I), MCL 750.520b(1)(a) (victim is under 13 years old). Defendant was sentenced to 9 to 18 years' imprisonment for each of his three convictions. We affirm.

First, defendant argues that there was insufficient evidence to support his convictions. This Court reviews a challenge to the sufficiency of the evidence de novo considering the evidence in the light most favorable to the prosecutor to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999); *People v Wilkens*, 267 Mich App 728, 738; 705 NW2d 728 (2005).

A person is guilty of first-degree criminal sexual conduct if he engages in sexual penetration with another person less than 13 years of age. MCL 750.520b(1)(a); *People v Hammons*, 210 Mich App 554, 557; 534 NW2d 183 (1995). "Sexual penetration" is defined as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body." MCL 750.520a(p). The testimony of the victim alone can constitute sufficient evidence to establish a defendant's guilt. MCL 750.520h; *People v Taylor*, 185 Mich App 1, 8; 460 NW2d 582 (1990).

Defendant was charged with three counts of criminal sexual conduct arising from allegations by his daughter that he sexually abused her by engaging in digital penetration (count one), cunnilingus (count two) and penile penetration (count three) repeatedly from the time that she was approximately nine years old until she was 11 or 12 years of age, during weekend visitations with him after her parents divorced.

More specifically, with respect to count one, the victim testified at trial that when she was nine or ten years old, defendant woke her up, took her downstairs to his bedroom, told her to lie down on the bed with him, told her to remove her pants and his pants, and after she complied, defendant placed his finger inside her vagina. The victim explained that defendant placed his finger "between the two folds," "in between" "the hole," and that defendant's finger went "inside" and it felt "[l]ike his two fingers were going inside there." According to the victim, this occurred on approximately ten separate occasions over the course of one or two years. This testimony was sufficient to find defendant guilty of digital penetration as charged in count one.

The victim further testified that when she was ten years old, defendant placed his tongue "between the two folds" of her vagina on two separate occasions. Penetration is defined to include cunnilingus, MCL 750.520a(p). This Court has defined "cunnilingus " as "the placing of the mouth of a person upon the external genital organs of the female which lie between the labia, or the labia itself [sic], or the mons pubes [sic]." *People v Legg,* 197 Mich App 131, 133; 494 NW2d 797 (1992), quoting *People v Harris,* 158 Mich App 463, 470; 404 NW2d 779 (1987). If cunnilingus is performed, there is no requirement that there be something additional in the way of penetration for there to be a "sexual penetration." *Harris, supra* at 470. Therefore, the victim's testimony constitutes sufficient evidence to find that defendant committed cunnilingus and consequently, to find defendant guilty of count two.

The victim also testified that when she was ten years old, defendant tried to place his penis "in between the two folds" of her vagina. When asked whether defendant's penis went into her vaginal opening, the victim replied, "[i]t like – it kind of did, but it didn't. Like I can't really explain . . . I remember it kind of felt like it sat in between the two folds but I don't remember." The victim's testimony sufficiently described penetration, even if only slightly, of her labia. To the extent that the jury found it necessary to infer penetration, "[c]ircumstantial evidence and reasonable inferences that arise from the evidence can constitute sufficient proof of the elements of the crime." *People v Akins,* 259 Mich App 545, 554; 675 NW2d 863 (2003). Therefore, there was sufficient evidence to find defendant guilty of count three.

Defendant's second claim is that he is entitled to a new trial because the trial court erred when it failed to instruct the jury concerning "sexual penetration," an essential element of the charged offenses. However, because defense counsel affirmatively expressed approval of the jury instructions, this issue is waived. *People v Matuszak,* 263 Mich App 42, 57; 687 NW2d 342 (2004) (a defendant's affirmative statement indicating his satisfaction with the jury instructions constitutes express approval of the instructions and waives review on appeal).

Defendant also asserts that the trial court erred in denying his motion for a new trial given that the verdict was against the great weight of the evidence. This Court reviews a trial court's decision with respect to a motion for a new trial for an abuse of discretion. *People v Cress,* 468 Mich 678, 691; 664 NW2d 174 (2003).

A motion for a new trial because the verdict was against the great weight of the evidence raises the issue of the credibility of the witnesses and is not favored. *People v Lemmon,* 456 Mich 625, 638-639; 476 NW2d 129 (1998). The determination whether a verdict was against the great weight of the evidence depends on "whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand." *People v Musser,* 259 Mich App 215, 218-219; 673 NW2d 800 (2003). A court should consider whether

to overrule the jury with great caution and with all presumptions running against the grant of a new trial; it may not substitute its view of witness credibility for the jury's determination of credibility. *Lemmon, supra* at 642-643. "Conflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial. [U]nless it can be said that directly contradictory testimony was so far impeached that 'it was deprived of all probative value or that the jury could not believe it,' or contradicted indisputable physical facts or defied physical realities, the trial court must defer to the jury's determination." *Musser, supra* at 219 (quoting *Lemmon, supra*).

Defendant asserts that the victim's credibility was impeached to the extent that her testimony had no probative value and therefore, the verdict was against the great weight of the evidence. The record revealed that the victim had lied on previous unrelated occasions. For instance, the victim's mother testified that the victim had been known to go out with her friends or boyfriend and lie about her whereabouts, and the victim admitted to lying in a note she wrote to her school attempting to explain and avoid discipline for her unexcused absences. However, defendant did not testify at trial and no evidence was presented to contradict the victim's testimony regarding the sexual assaults. The fact that the victim lied on several previous occasions regarding unrelated matters does not necessitate a finding that her allegations against defendant are lies. The instances where the victim lied appear to share a common thread – the victim's desire to avoid getting into trouble. It is not readily apparent how the victim would benefit by fabricating the instant allegations against defendant. Although defendant asserted that the victim fabricated the allegations because she was upset with him for disapproving of her boyfriend, the disapproval did not rise to the level of defendant forbidding the victim to see her boyfriend. The victim testified that she loves defendant and never wanted to get him into trouble. The victim's mother also testified that the victim did not bear any ill will toward defendant, that the victim and defendant appeared to have a good relationship and that the victim seemed genuinely distraught at the idea of defendant getting into trouble.

The victim's impeachment did not rise to the level necessary to repudiate the jury's verdict. Defendant has not established that his case constitutes an exceptional case where the testimony is so lacking in probative value, or so contradicts indisputable physical facts or laws or defies physical realities that the jury's verdict should be overturned. Accordingly, the trial court did not abuse its discretion in determining that the jury's verdict should not be overturned. *Lemmon, supra* at 643, 647 (conflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial; "if 'it cannot be said as a matter of law that the testimony thus impeached was deprived of all probative value or that the jury could not believe it,' the credibility of witnesses is for the jury," quoting *Anderson v Conterio*, 303 Mich 75, 79; 5 NW2d 572 (1942)).

Next, defendant claims that the prosecutor engaged in misconduct, thus denying him his right to a fair trial. The test of prosecutorial misconduct is whether the defendant was denied a fair and impartial trial, i.e., whether prejudice resulted. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). This Court reviews defendant's unpreserved claims of prosecutorial misconduct for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 762-763; 597 NW2d 130 (1999). To avoid forfeiture under the plain error rule, defendant must establish that: (1) an error occurred; (2) the error was plain; (3) and the plain error affected defendant's substantial rights, i.e., it affected the outcome of the lower court proceedings.

Carines, *supra* at 763. Even where such error is shown, reversal of a conviction is warranted only when the established plain error resulted in the conviction of an actually innocent defendant or the error seriously affected the fairness, integrity, or public reputation of judicial proceedings. *Id*. at 763-764.

Prosecutorial misconduct issues are decided on a case-by-case basis, and the reviewing court must examine the record and evaluate a prosecutor's remarks in context. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004). "The propriety of a prosecutor's remarks depends on all the facts of the case." *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). Prosecutorial comments must be read as a whole and evaluated in light of defense arguments and the relationship they bear to the evidence admitted at trial. *People v Brown*, 267 Mich App 141, 152; 703 NW2d 230 (2005); *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), rev'd in part on other grounds *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

First, defendant contends that during his cross-examination of defendant's mother and stepfather, the prosecutor improperly shifted the burden of proof to defendant to present evidence of his innocence. In his opening statement, defense counsel set forth the theory that the sexual assaults could not have occurred because the house where defendant lived was very small and inhabited by multiple people who could readily see and hear what went on throughout the house. Counsel maintained that, given that no one else in the house heard or saw the sexual assaults, the assaults simply could not have occurred. In response to this assertion, the prosecutor asked defendant's parents whether they had ever invited the police to the house to substantiate the defense that the sexual assaults could not have occurred there.

A prosecutor may not shift the burden of proof. *People v Fields*, 450 Mich 94, 112-113; 538 NW2d 356 (1995). However, where a defendant advances a theory of the case, the prosecutor's comments on defendant's failure to produce corroborating evidence do not shift the burden of proof. *Id.* at 111-112, 115-116. Here, the prosecutor's questioning defendant's parents represents not a shifting of the burden of proof, but rather, the prosecutor's effort to undercut one of defendant's theories of the case. Additionally, the trial court instructed the jury regarding the presumption of innocence and stated that the burden of proof was entirely on the prosecution. These instructions were sufficient to address any potential confusion with respect to the burden of proof. Accordingly, the prosecutor did not improperly shift the burden of proof during cross-examination.

Defendant also contends that the prosecutor improperly vouched for the victim's credibility and evoked sympathy for the victim. The prosecutor suggested that the victim was credible because the victim had no apparent reason to fabricate allegations against her own father. Although the prosecutor submitted that the victim's testimony was truthful, she emphasized that she was not vouching for the victim's credibility. In his opening statement, defense counsel stated, "the Government said – is of the opinion that the complainant is someone who can be trusted. They've already told you that they can trust her even though there is [sic] been –." The prosecutor interrupted, stating, "[y]our Honor, I just don't need that. I never said that I trust her nor would I." Any possibility that the jury would interpret the prosecutor's past or future remarks as vouching for the victim's credibility was dispelled by such a comment.

Likewise, the prosecutor's closing remarks, that the victim did not have a motive to lie and her allegations have caused her and her family much pain, are consistent with a permissible commentary on the evidence, and not an improper bid for sympathy. Testimony established that the victim loved defendant and did not want him to get in trouble, therefore she heeded his warning that she should not tell anyone about the abuse, lest he be sent to jail. The prosecutor's remarks, which had their basis in the evidence on record and rational inferences thereof, were a permissible commentary on the evidence. *People v Bahoda*, 448 Mich 261, 282; 531 NW2d 659 (1995) (prosecutors are accorded great latitude regarding their arguments and conduct and are free to argue the evidence and all reasonable inferences from the evidence as it relates to their theory of the case). Accordingly, the prosecutor did not improperly vouch for the victim's credibility or elicit sympathy for the victim.

Next, defendant challenges the prosecutor's characterization of the testimony of defendant's other daughter as "incredible," and the prosecutor's comment, "[t]here is no reason for [defendant] to make excuses for a crime he didn't commit. Common sense tells you that those are the comments of a person with a guilty conscious [sic]." Defendant's other daughter, who shared a house with defendant, testified that she knew what everyone in the house was doing, even when she was sleeping. Although it is appreciated that the house was small and its inhabitants often knew what the others were doing, it is unreasonable to suggest that one would know what everyone in the house is doing while one is sleeping. A prosecutor may argue from the facts that a witness is not worthy of belief. *People v Launsburry,* 217 Mich App 358, 361; 551 NW2d 460 (1996). The prosecutor's remark was based on testimony on the record and was reasonable given the seemingly unsupported claims of this witness.

Similarly, the prosecutor's remark regarding defendant's statements attempting to excuse his crimes was a proper comment on the credibility of a witness. The comment was based on the evidence, specifically on the victim's testimony that defendant sexually assaulted her and defendant's inculpatory statements to that effect to various witnesses. Therefore, it was not improper.

Further, even assuming that one or more of the prosecutor's comments were improper, none can be considered to have affected the outcome of the proceedings given that there was sufficient evidence to find defendant committed the offenses. *People v Smith,* 243 Mich App 657, 690; 625 NW2d 46 (2000).

Finally, defendant asserts that he was denied the effective assistance of counsel when his counsel failed to object to allegedly improper prosecutorial conduct. The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The court must first find the facts and then decide whether those facts constitute a violation of the defendant's constitutional right to the effective assistance of counsel. *Id*. The trial court's factual findings are reviewed for clear error, while its constitutional determinations are reviewed de novo. *Id*.

To establish ineffective assistance of counsel, a defendant must show: (1) that counsel's performance was below an objective standard of reasonableness under prevailing professional norms; (2) that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and (3) that the resultant proceedings were

fundamentally unfair or unreliable. *People v Toma*, 462 Mich 281, 302; 613 NW2d 694 (2000). Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *LeBlanc, supra* at 578; *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004). Counsel's performance must be measured against an objective standard of reasonableness and without benefit of hindsight. *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

Defendant bases his entire claim of ineffective assistance on his counsel's failure to object to the alleged prosecutorial misconduct discussed above. Given our conclusion that none of the challenged remarks constituted prosecutorial misconduct, defense counsel was not ineffective for failing to object to the prosecutor's remarks. *People v Knapp*, 244 Mich App 361, 386; 624 NW2d 227 (2001) (counsel is not required to make a frivolous objection, or advocate a meritless position).

We affirm.

/s/ Richard A. Bandstra
/s/ Brian K. Zahra
/s/ Karen M. Fort Hood